Alan Setiawan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–342 OF 2009
SULONG MATJERAIE, ABDUL WAHAB PATAIL AND AZIAH ALI JJCA
27 JANUARY 2012

Criminal Procedure — Defence — Failure to mention material part of defence at earlier stage — Convicted drug trafficker alleged bag containing drugs belonged to another man ('Udin') with him during police ambush — Allegation that Udin carried bag at material time — Prosecution's evidence denied Udin's existence — Whether accused's failure to inform police of Udin's existence at time of arrest significant — Whether accused's failure to give police details about Udin to enable them to find him rendered his evidence about Udin unbelievable — Whether accused raised any reasonable doubt on prosecution's case

The appellant ('accused') was convicted and sentenced to death by the High Court for trafficking in 2000g of ganja in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952. In his appeal to the Court of Appeal against conviction and sentence, the accused contended that the trial judge was wrong to have held that (i) he knew about the existence of the drugs in a green bag recovered at the time of his arrest (ii) a person named 'Udin', to whom the bag alleged belonged, was non-existent and (iii) there was no doubt the exhibits that were sent to the chemist for analysis were the same ones the arresting officer had seized from the crime scene. According to the prosecution's evidence, the accused was arrested during a police anti-drug operation while he was walking alone towards the entrance of a fertilizer warehouse carrying a plastic bag. He attempted to run away when the police identified themselves and during the struggle to arrest him, the bag, containing the incriminating drugs, fell from the accused's hand to the ground. The accused, however, maintained that at the material time he was not alone but was walking behind another man named 'Udin' and that Udin was the one who was holding the bag. He said when there were shouts of 'police', Udin threw the bag to the ground and ran but the police were only able to arrest the accused. The accused said he told the investigating officer of the case, SP4, about Udin but SP4 denied this in her testimony.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The accused's failure at the time of his arrest to notify his arresting officer, SP3, that the drugs belonged to Udin was significant. No reason was

given why he did not do so. SP3, being on the scene, would have known whether there was another person or could have immediately followed up on such information (see para 41).

(2) The accused did not give any further details to the police to assist them in locating and arresting Udin or in the course of the trial so as to render credible his testimony on the issue of the existence of Udin (see para 29).

(3) As at the end of the prosecution's case, it could not be said that there was some evidence establishing a reasonable doubt that another person named Udin existed and was the owner of the plastic bag and its contents and that the accused was innocent. The trial judge therefore did not err in calling upon the accused to enter his defence (see paras 22–23).

(4) The trial judge did not make any finding that contradicted the evidence when he concluded there was no reason to entertain any reasonable doubt that the accused knew what was in the green plastic bag and the nature of it. There was also no evidence to support the submission that a reasonable doubt existed with regard to the identity of the exhibits (see paras 44, 49 & 46).

[Bahasa Malaysia summary

Perayu ('tertuduh') disabit dan dihukum mati oleh Mahkamah Tinggi kerana mengedar 2000g ganja bertentangan s 39B(1)(a) Akta Dadah Berbahaya 1952. Dalam rayuannya ke Mahkamah Rayuan terhadap sabitan dan hukuman, tertuduh berhujah bahawa hakim perbicaraan adalah salah dengan memutuskan bahawa (i) dia mengetahui mengenai kewujudan dadah di dalam beg berwarna hijau yang dirampas pada masa penangkapannya (ii) seseorang yang bernama 'Udin', beg yang didakwa kepunyaannya, adalah tidak wujud dan (iii) tiada keraguan ekshibit-ekshibit yang dihantar kepada ahli kimia untuk dianalisis adalah barang yang sama yang dirampas oleh pegawai yang menangkap dari tempat jenayah. Mengikut keterangan pihak pendakwaan, tertuduh ditangkap semasa operasi anti dadah polis apabila dia berjalan keseorangan ke arah pintu masuk gudang baja dengan memegang beg plastik. Dia mencuba untuk melarikan diri apabila anggota polis memperkenalkan diri mereka dan semasa pergelutan untuk menangkap dia, beg yang mengandungi dadah tersebut jatuh daripada tangan tertuduh ke tanah. tertuduh walau bagaimanapun mengekalkan bahawa pada masa material dia bukan bersendirian tetapi berjalan di belakang seorang lelaki lain yang bernama 'Udin' dan bahawa Udinlah yang memegang beg tersebut. Dia menyatakan apabila terdengar jeritan 'polis', Udin membuang beg tersebut ke tanah dan lari tetapi anggota-anggota polis tersebut hanya dapat menangkap tertuduh. tertuduh menyatakan yang dia memberitahu pegawai penyiasat kes tersebut, SP4, mengenai Udin tetapi SP4 menafikan ini di dalam testimoninya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Kegagalan tertuduh pada masa penangkapannya untuk memberitahu

pegawai yang menangkapnya, SP3, yang dadah tersebut dipunyai oleh Udin adalah ketara. Tiada alasan diberi mengapa dia tidak berbuat demikian. SP3, dengan berada di tempat kejadian, akan tahu sama ada terdapat seorang yang lain atau dapat dengan segera mengikuti dengan maklumat sedemikian (lihat perenggan 41).

(2) Tertuduh tidak memberi apa-apa butir-butir lanjut kepada pihak polis untuk membantu mereka dalam mengesan dan menangkap Udin atau dalam perbicaraan untuk menjadikan testimoninya boleh dipercayai atas isu kewujudan Udin (lihat perenggan 29).

(3) Pada akhir kes pihak pendakwaan, ia tidak dapat dikatakan bahawa terdapat sebahagian keterangan membuktikan keraguan yang munasabah bahawa seorang yang lain bernama Udin wujud dan tuan punya beg plastik dan kandungannya dan bahawa tertuduh tidak bersalah. Hakim perbicaraan oleh itu tidak tersilap dalam memanggil tertuduh untuk memasukkan pembelaannya (lihat perenggan 22–23).

(4) Hakim perbicaraan tidak membuat apa-apa dapatan yang bercanggah dengan keterangan apabila dia memutuskan tidak terdapat alasan untuk melayani apa-apa keraguan munasabah bahawa tertuduh mengetahui apa yang terdapat di dalam beg plastik berwarna hijau tersebut dan sifatnya. Juga tidak terdapat keterangan untuk menyokong penghujahan bahawa keraguan munasabah wujud berkaitan identiti ekshibit-ekshibit tersebut (lihat perenggan 44, 49 & 46).]

Notes

For a case on failure to mention material part of defence at earlier stage, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1837.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (folld)

Mat v PP [1963] MLJ 263; [1963] 1 LNS 82, HC (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)

PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115 (refd)

Tan Boon Kean v PP [1995] 3 MLJ 514; [1995] 4 CLJ 456, FC (refd)

Teng Howe Sing v PP [2009] 3 MLJ 46; [2001] 3 CLJ 733, FC (refd)

Legislation referred to

Criminal Procedure Code s 180

Dangerous Drugs Act 1952 s 39B(1)(a), (2), First Schedule

Appeal from: Case No 45–120 of 2008 (High Court, Shah Alam)

Hasshahari bin Johari (Wan Idi Amin bin Ibrahim with him) (Hasshahari & Partners) for the appellant.
Tengku Amir Zaki (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Alan Setiawan (the accused) was charged with an offence as follows:

> Bahawa kamu pada 25/04/2008 jam lebih kurang 08.30 malam, di kawasan lapang di Gudang Baja, Pelabuhan Klang, di dalam daerah Klang, di dalam Negeri Selangor, telah didapati mengedar dadah merbahaya iaitu jenis ganja sejumlah berat 2000 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] He was tried, and upon conviction, was sentenced to the penalty provided by law. He has appealed to this Court on both conviction and sentence.

BACKGROUND

[3] The brief background as is relevant to the grounds of appeal being pursued is as follows.

[4] The accused was arrested on the 25 April 2008 at about 8.30pm at an open space of a fertiliser warehouse at Jalan Pelabuhan Klang, in the district of Klang, Negeri Selangor Darul Ehsan.

[5] About an hour before the commencement of the operation 'Ops Tapis' executed for the purpose of apprehending and deterring illegal drug activities on 25 April 2008, Insp Mohd Azren bin Isa 1/17571 ('SP3') and the several officers in two teams were briefed about the operation at the fertiliser warehouse along Jalan Pelabuhan Klang. On arrival, the team headed by SP3 was positioned inside the warehouse behind the entrance. About 30 minutes into the stakeout, SP3 observed the accused walking towards the entrance of the warehouse carrying a plastic bag in his left-hand. The accused was walking alone. SP3 and his second police team proceeded to approach the accused and introduced themselves as the police. The accused had attempted to run away. During the police struggle the plastic bag the accused was alleged to be holding fell from his grasp onto the ground. Having arrested the accused at about 8.30pm, and recovered and taken custody of the plastic bag, SP3 proceeded to

examine it and its contents in the presence of the accused and the other police officers. The plastic bag was green coloured. The contents consisted of two pieces of compressed dried leaves, one wrapped in a translucent plastic and white paper and the other wrapped in translucent plastic.

[6] The exhibits were handed over by SP3 to the investigating officer, Inspektor Salmi Nida bt Ibrahim 1/16838 ('SP4').

[7] Twelve grounds of appeal were set out in the accused's petition of appeal. The appeal was proceeded with before us on the following broad grounds:

(a) error in failing to draw the inference that the accused did not know about the drug in the green bag;

(b) error in failing to draw the inference that one 'Udin' existed; and

(c) error in failing to hold there was doubt in identity of the exhibits.

[8] To examine these grounds, we proceeded in two steps by asking ourselves:

(a) how did the learned judge come to the said errors; and

(b) in the light of the grounds of appeal submitted before us, was it demonstrated that he had so erred?.

[9] Proceeding on the first step we find the judgment demonstrates that the learned judge had properly set out his judgement in the two parts consistent with s 180 of the Criminal Procedure Code (Revised 1999) Act 593: the prosecution case and the defence case.

[10] In that part pertaining to the prosecution case, he first set out the charge, and summarised the facts established by the prosecution evidence. To bring it into perspective, the learned judge set out a summary of the arguments for the defence and the prosecution. Then the learned judge proceeded to set out his findings at the end of the prosecution case. In doing so he addressed his mind to the following questions:

(a) whether the drugs seized were dangerous drugs in accordance to the law;

(b) whether the accused was in possession of the dangerous drugs; and

(c) whether the presumption of trafficking in dangerous drug was established.

[11] We are satisfied from the judgment and the notes of evidence that the learned judge had conducted a maximum evaluation and come to affirmative

findings on the above questions before making his finding that the prosecution had made out a prima facie case and called upon the accused to enter upon his defence.

[12] In the second part which pertains to the defence case, he addressed his mind to:

(a) the evidence of the accused;

(b) submissions of the defence counsel;

(c) submissions of the prosecution; and

(d) then only made his findings and conclusion at the end of the defence case.

[13] We do not think it necessary to set out the entire arguments of the prosecution and of the defence as well as the reasoning of the learned judge in respect of his findings, except those as it pertains to the grounds of appeal as necessary below.

[14] We are also satisfied that the learned judge had had systematically considered the evidence of the accused, submissions of the defence and prosecution before setting out his findings.

[15] We proceed to address the substance of the appeal now before us. Although 12 grounds were set out in the petition of appeal, only the following three grounds were proceeded with:

(a) knowledge of substance in the green bag and the inference from his attempt to run away;

(b) inference as to existence of 'Udin'; and

(c) doubt in identity of exhibit.

[16] Since the submission on the accused's knowledge of the substance in the green bag in part depends on the existence of Udin, it is appropriate to begin by addressing the issue of the inference that Udin existed.

INFERENCE AS TO EXISTENCE OF 'UDIN'

[17] The existence of Udin was raised by the accused during cross-examination of the prosecution witnesses, and by the accused in his testimony when his defence was called, had stated that he had told SP4. The case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 (FC) was relied upon for the proposition that the prosecution must address the story of an accused, to determine whether it is

true or not. But given the finding in that appeal that the trial judge had wrongly assumed that the disclosure was belated, the proposition it is now being cited for is clearly not the ratio decidendi of that decision. The proposition nevertheless is at least persuasive. We proceed to examine whether the facts warrant the application of that proposition.

[18] SP3 was the officer who arrested the accused. We examined the cross-examination of SP3. The existence of Udin was put to SP3 during cross-examination in a series of questions as follows:

Put: Saya juga katakan malam itu ada 2 orang datang ke gudang di P11 A?

Put: Saya juga katakan pada hari itu iaitu tarikh, waktu tertuduh pada hari itu mengekori seorang di hadapan?

Put: Saya juga katakan pada hari itu seorang bernama Udin di mana Udin berada di hadapan tertuduh mengekori dari belakang?

Put: Saya juga katakan pada hari itu Udin membawa beg warna hitam seperti dalam gambar P10A dan P10B dan bukannya tertuduh?

Put: Udin adalah seorang berwarganegara Indonesia?

Put: Dan juga pada hari itu anggota-anggota telah menjerit 'polis, polis' dan lepas itu Udin yang baling beg warna hijau di tempat yang mana Insp. kata di tempat bertanda 'X' dalam P11B?

Put: Saya juga katakan semasa Insp. dan anggota nyatakan 'polis, polis' Udin sempat lari dari tempat kejadian?

Put: Saya juga katakan kepada Inspektor tertuduh tertangkap kerana beliau di belakang Udin sebab itu Insp. Dan anggota senang menangkap tertuduh?

Put: Saya juga katakan pada hari itu tertuduh tidak menjinjing beg plastik hijau (P7) itu?.

[19] To all these questions, except as to citizenship of 'Udin' to which he said he did not know 'Udin', SP3 had disagreed with the defence.

[20] It was put in the cross-examination of SP4 that the accused had informed her that the bag belonged to 'Udin'. SP4 however denied that she was so informed. We set out the relevant cross-examination as follows:

S: Saya katakan pada hari itu bila Insp berjumpa dengan hubungi tertuduh, tertuduh katakan kepada Insp. beg hijau itu adalah kepunyaan seorang bernama Udin. Setuju dengan saya?

J: Tidak setuju.

…

S: Saya katakan kepada Insp dalam kes ini tertuduh tidak menjinjing beg plastic P7, beg plastik berwarna hijau ini. Setuju dengan saya?

J: Tidak setuju.

S: Juga saya katakan kepada Insp dalam kes ini tertuduh tidak tahu isi kandungan dalam beg plastic berwarna hijau. Setuju dengan saya?

J: Tidak setuju.

S: Saya juga katakan beg plastik berwarna hijau ini adalah kepunyaan Udin?

J: Tidak setuju.

[21] The grounds of judgment of the learned judge reflected the defence submissions at the end of the prosecution case in respect of the existence of 'Udin'. The learned judge however did not specifically set out his findings on 'Udin' before calling upon the accused to enter on his defence. Bearing in mind the grounds of judgment was written some time after the findings and decision has been made, and bearing the evidence before the learned judge, we do not think it is valid to conclude that the learned judge had in fact overlooked to consider the point when he made his decision merely because in his grounds of judgment subsequently written that point was not specifically addressed. We find it is implicit in his decision that he rejected it since he had made the specific finding that from his personal observation SP3 was a credible and consistent witness and accepted his testimony.

[22] We observe that although not raising an issue in the cross-examination of relevant witnesses would estop raising the issue later, the fact it was raised in the cross-examination only serves to establish the issue as a line of defence, but unless it was conceded to or admitted by the witness who was cross-examined, it does not establish the defence itself. It follows that as at the end of the prosecution case in this case, it cannot be said there was some evidence establishing a reasonable doubt that another person, 'Udin' existed, was the owner of the green plastic bag and its contents, and that the accused was innocent.

[23] In the circumstances, it cannot be held that the learned judge erred in calling upon the accused to enter on his defence.

[24] When called to enter on his defence, the accused himself testified as follows, that he was walking behind 'Udin' when he heard the sound 'polis, polis', that Udin ran while he looked back and was caught by the police. He testified Udin threw down the green plastic bag and the police picked it up. He testified:

S: Siapa nama anggota polis yang tanya kamu pada keesokan hari?

J: Seorang perempuan bernama Salmi Nida.

S: Apakah yang Salmi Nida tanya kamu?

J: Salmi Nida tanya kepada saya siapa yang punya beg hijau itu.

S: Apa jawapan kamu?

J: Saya beritahu beg hijau itu kepunyaan Udin.

S: Ada Salmi Nida tanya lain-lain soalan lagi?

J: Dia tanya saya berapa lama saya kenal dengan Udin.

S: Ada apa-apa soalan lagi dari Salmi Nida kepada kamu?

J: Berapa lama saya sudah kenal Udin. Saya jawab lebih kurang 1 tahun. Itu pun saya tidak selalu jumpanya sebab saya kampung.

S: Ada lagi soalan yang ditanya oleh Salmi Nida? J: Dia tanya saya samada saya sudah berkeluarga. Saya jawab saya sudah berkeluarga.

J: Ada lagi soalan yang ditanya Salmi Nida? J: Dia tanya saya berapa anak saya. Saya beritahu saya mempunyai 4 orang anak.

S: Dia bertanya lagi berapa umur anak saya?

J: Saya jawab pertama umur 14 tahun. Yang kecil sekali berumur 4 tahun.

S: Lagi ada apa-apa?

J: Tidak ada lagi.

…

S: Masa Udin melarikan diri ke arah hutan adakah Udin bawa beg hijau itu?

J: Tidak bawa.

S: Kalau Udin tidak bawa beg hijau itu, di manakah beg hijau itu berada?

J: Di atas tanah di hadapan saya.

S: Adakah kamu pegang beg hijau itu?

J: Saya tidak memegang beg hijau itu.

[25] That the green plastic bag belonged to 'Udin' was not conceded by the prosecution. The prosecution challenged his testimony as to the existence of 'Udin' or that SP4 was informed it belonged to 'Udin'.

[26] We observed that while he merely said in examination-in-chief that:

(a) 'Pada masa itu polis tangkap saya daripada belakang sampai saya tidak boleh bernafas. Saya terjatuh.', and in cross-examination he denied he wrestled with the police before he was arrested;

(b) that while walking to the factory he saw Udin carry the green plastic bag, and in cross-examination twice he said the first time he saw the bag was 'J: Semasa saya dibawa ke kilang oleh Udin.'; and

(c) in re-examination a) his version escalated to 'J: Pada masa ditangkap saya

dipijak dan saya beritahu yang ini bukan kepunyaan saya dan itu adalah kepunyaan Udin.', b) the first time he saw the bag changed to 'J: Semasa Udin datang menjemput saya mengajak kerja.' and that this was 'J: Di pelabuhan.'

[27] We observe also the accused said:

(a) in examination-in-chief that when he heard the sound 'polis, polis' 'J: Pada masa itu Udin lari. Saya toleh ke belakang lalu kena tangkap' and he explained 'J: Pada masa itu polis tangkap saya daripada belakang sampai saya tidak boleh bernafas. Saya terjatuh.';

(b) in cross-examination he said he heard the sound 'polis polis' came from behind him and denied wrestling with the police before they could arrest him; and

(c) but in re-examination, to address the difficult but obvious question why he did not tell SP3 about Udin, his answer 'J: Pada masa ditangkap saya dipijak dan saya beritahu yang ini bukan kepunyaan saya dan itu adalah kepunyaan Udin.' conflicted with the version his own counsel put to him '… Awak setuju masa tangkap peluang baik untuk sebut nama Udin. Boleh jelaskan kepada mahkamah kenapa kamu tidak menyebut nama Udin kepada polis waktu itu?'.

[28] In that part of his judgment dealing with the end of the defence's case, the learned judge had set out the testimony and the submissions relating to the role of 'Udin' at some length. It was the first subject dealt with in this part of the judgment. The learned judge relied upon the guidance from *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2001] 3 CLJ 733 (FC). He dealt with the subject of 'Udin' at great length and from various aspects of the evidence before rejecting the defence version of the existence and the role of Udin.

[29] We did not find any error in the systematic manner the learned judge dealt with the question. He correctly observed the accused had not given any further details to the police to assist in locating and arresting Udin or in the course of the trial so as to render credibility to his testimony on the issue as to the existence of Udin. His findings was not in contradiction of the evidence before him, and he did not make any finding on this part that he as a judge exercising original jurisdiction, with the advantage of seeing and hearing witnesses, in particular the accused, was not entitled or justified to make. On the basis of the written record of appeal and in particular the notes of evidence, this court has no reason to disagree with the findings by the learned judge for the reasons that he gave. We find that in the sole reliance upon *Teng Howe Sing v Public Prosecutor* on this issue, there could be no doubt that the learned judge had rejected this part of the defence as not raising any reasonable doubt.

[30] We therefore dismiss this ground of appeal.

KNOWLEDGE OF SUBSTANCE IN THE GREEN BAG

[31] In the submissions before us, the facts relied upon by the accused are these:

(a) he did not dispute being found in possession of the plastic bag, but that the bag belonged to one 'Udin';

(b) he had given information that he had entered Malaysia about 25 March 2008, and SP3, SP4 agreed that the accused had Indonesian Rupiahs on him at the time of arrest;

(c) his passport was valid until 25 April 2008;

(d) at the time he was arrested it was dark;

(e) the bag belonged to Udin; and

(f) he ran away not because of any guilty knowledge.

[32] It was submitted that on these facts the inference of guilty knowledge ought not to have been made that because:

(a) the inference that could have been made was that he feared for his personal safety since the place was dark and most importantly his passport had reached the end of its validity, he had no valid work pass, and having only recently entered Malaysia can be deemed not to have knowledge of Malaysian laws, and having only Indonesian Rupiahs it was very likely he was preparing to return to Indonesia in the near future;

(b) in addition the learned judge was confused as to when the incident occurred as he referred many times to arrest on 26 April 2008 when it occurred on the 25 April 2008; and

(c) the learned judge had also referred to the expiry date of the accused's passport as 26 April 2008 when it was 25 April 2008.

[33] We deal with the matter in para [32] b and c above first.

[34] Examination of the notes of evidence showed the charge, opening statement and the evidence was that the arrest of the accused and discovery of the cannabis was at the same time on 25 April 2008. The grounds of judgment itself began with the correct reference to 25 April 2008. The first appearance of 26 April 2008 was at p 4 of the judgment, in reference to the handing over of the exhibits by SP3 to SP4 at 1.40am. The second reference is SP4 proceeding to the warehouse at 12.40pm on 26 April 2008. The third reference was to a

denial by SP4 that on 26 April 2008 the accused had told him he went to the warehouse to look for work with a person called 'Udin'. These were apparently correct references, and at p 5 of the judgment the learned judge correctly referred to the date of confiscation of the drugs as 25 April 2008.

[35] The first apparently erroneous reference to the 26 April 2008 appeared at p 7 in the section on arguments by the prosecution. From then on at pp 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 24.

[36] We asked ourselves where this date 25 April 2008 came from. We found it did not come from any party or witness. Indeed the date 25 April 2008 was not itself the subject of any dispute, and although it first appeared in that section of the judgment on arguments by the prosecution, there was no reference by the prosecution to 25 April 2008. It was clearly an error that emerged solely in the grounds of judgment dated 22 February 2010 after decision on 4 December 2009.

[37] We asked ourselves whether the error was so material it led the learned judge to a conclusion that he would otherwise not, but for that error, have made. Reluctant, as we should be, to treat any error lightly, the foregoing demonstrated to us that the error could not possibly have led and did not lead the judge in this instant case to a decision he would not otherwise have made.

[38] We note the learned judge referred to SP4 as 'he'. It is an error but it does not affect the judgment. It is clear that the errors result from inattention to editing rather than that material errors of fact had been made. We make the observation that although grounds of appeal is couched in language that the judge had erred, an appeal does not succeed merely on showing there is an error, but that the error led the judge to a decision he would otherwise not have made or is so material it makes the decision unsafe.

[39] We now address the matter at para [32] a above.

[40] The learned judge set out his findings at the end of the defence case. He found that apart from his testimony, the accused had not given any further details to the police to assist in locating and arresting Udin or in the course of the trial to render his testimony on the issue as to the existence of Udin as credible. The decision of the Federal Court in *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46 (FC) on a similar issue is that the failure to provide relevant information about an alleged another person responsible, to enable the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.

[41] As we have observed earlier above, the failure to raise with SP3 at the

time of arrest that the drugs belonged to 'Udin' is significant. No reason was given why he did not do so until after cross-examination at which point the question by his counsel and his answer conflicted with each other. SP3 being on the scene would know whether there was another person, or could have immediately followed up on his information. There was no reason, therefore, for the learned judge not:

(a) to draw the inference that the accused knew what was in the green plastic bag and the nature of it as cannabis as proscribed under the First Schedule in the Dangerous Drugs Act 1952; and

(b) to hold that the defence had not raised any reasonable doubt.

[42] It is trite that ignorance of the law is no defence. It is unreasonable it be available as a defence to a non-citizen when it is not available to the citizens. No law provides that it does. There is also no evidence advanced and there is therefore no reason to believe that the laws of our neighbouring sovereign states are so different that they are in contradiction of our laws. Having no valid work pass is no reason for fear unless one is caught working. Even though his passport had reached the end of its validity, all that it means is he would have to leave. If the argument is that having only rupiahs on him meant it was very likely he was preparing to return to Indonesia in the very near future, there would be even less reason to try to run away. The argument of the police not being in uniform has its pros and cons and is therefore neither here nor there. More germane is the reason given that the accused feared for his personal safety because the place was dark. But it is never suggested he went to the fertiliser warehouse area against his will. If he went on his own free will, then the reason he now gives cannot be believed. Indeed his version of what occurred suggests he did not try to run or to struggle to avoid arrest. There is no reason to believe the version by the accused.

[43] In *Mat v Public Prosecutor* [1963] MLJ 263; [1963] 1 LNS 82, (HC), it has been held that it does not entitle a trial judge to convict if he does not believe the explanation by the accused, for the latter is still entitled to an acquittal if there is a reasonable doubt as to the accused's guilt. This is a principle applied in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115. *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073 (SC). *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514; [1995] 4 CLJ 456 (FC). The point made is not so much between belief and a reasonable doubt, but that while obviously there is a reasonable doubt if the accused's version is believed, the fact that it is not believed is not in criminal law the determinant of guilt. The question that must be addressed is whether the defence raised a reasonable doubt. A reasonable doubt is not just any theoretically or hypothetically possible doubt. A reasonable doubt is a doubt which taken into consideration with all the particular facts and circumstances

of the case after having heard the witnesses and the accused testify and tested before him, leaves the trial judge with the thought there is or there is no reasonable doubt.

[44] We do not find that the learned judge had erred in any manner in his consideration of the facts and application of the law. Nor did the learned judge made any finding that contradicted the evidence before him when he concluded there is no reason to entertain any reasonable doubt the accused knew what was in the green plastic bag and the nature of it. Thus, the submissions before us on this ground give us no reason to hold that the learned judge had erred in drawing the inference of knowledge of the cannabis in his possession and of the nature of it. There is nothing that requires this court to intervene to correct an error. To intervene, in the circumstances, would be an interference not sanctioned by law.

DOUBT IN IDENTITY OF EXHIBIT

[45] The ground addressed before us as raising a reasonable doubt in the identity of the exhibit is that:

(a) *SP3 menyatakan bahawa dadah yang dijumpai (bungkusan B dan C) seberat masing-masingnya 1000 gram setiap satu (ms 38, jilid 1)*; and

(b) *SP4 menyatakan bahawa dadah yang dijumpai adalah sebagaimana yang berikut; (a) Bungkusan B = 1100 gram (b) Bungkusan C = 900 gram (ms 74, Jilid 2).*

[46] It was submitted the discrepancy is material and raised a reasonable doubt whether the exhibits handed to the chemist Maimonah bt Sulaiman (SP1) by SP4 and analysed by her was the same as that taken custody of by SP3.

[47] On examination of the notes of evidence, we found the examination of SP3 referred to is as follows:

S: Rujuk P12 & P13, berat anggaran dadah 1000 gram dan 1000 gram?

J: Anggaran berat tersebut saya dapati hasil daripada timbangan yang saya telah buat menggunakan timbang yang dibekalkan di pejabat narkotik.

[48] And of SP4 it was as follows:

S: Rujuk saksi kepada PI OB — Insp Ada beritahu semasa Pemeriksaan Utama anggaran berat kasar. Berapa anggaran berat kasar bungkusan'B'?

J: Lebih kurang 1100 gram.

S: Berapakah anggaran berat kasar bungkusan C?

A J: Lebih kurang 900 gram.

[49] The submission is not supported by the evidence. We dismiss this ground of appeal.

B

[50] With the dismissal of all of the grounds of appeal pursued before us, we dismissed the appeal, and affirmed the conviction and sentence passed by the learned trial judge.

C *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

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